

LIOW SANG & ANOR.

v.

HANG CHAP YAM, KOLAM IKAN
HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL SUIT NO. 173 OF 1979]
18 MAY 1984

TORT: Nuisance - Flooding - Dam causing obstruction to stream - Damage to rubber and fruit trees - Liability - Mitigation.

The plaintiffs who were husband and wife were owners of three lots and one lot respectively of rubber land. The first lot was purchased in 1973 and the remaining three lots were purchased in 1976. A stream ran through two of the lots of land. The first plaintiff had dug a well in the stream on his land for his use and the defendant had built a dam near the well, apparently with the permission of the 1st plaintiff, for the purposes of providing water for his fish pond. The dam and well were built on the first lot of land shortly after it was purchased.

In or about October 1976, the plaintiffs discovered there was flooding in parts of the rubber land which continued till 1977, thus damaging their rubber and fruit trees. The plaintiffs alleged this was due to a second dam built by the defendant on his own land which created an obstruction in the stream. The plaintiffs claimed damages. The defendant denied liability and stated further that the plaintiffs did not construct any drains to drain away the water or weed the land to mitigate their losses.

Held:

[1] The dam on the defendant's land had caused overflowing of the stream water in the upper part of the stream where it ran through the plaintiffs' land and that overflowing of the stream combined with rain caused the flooding. A person who chooses to build a dam across a stream for the collection of water is bound to protect all persons from all, including extraordinary, danger (following *Kerr v. Earl of Orkney* 20 D. 298 at 302). Therefore liability was proved.

[2] There was no reason why the plaintiffs should build drains to mitigate their losses so as to drain away flood water brought about by someone's wrongful act, the cessation of which would bring an immediate end to the collection of the flood water. However, when the rubber trees died the plaintiffs would have to mitigate their losses by replanting, for though the trees were destroyed, the land on which they were planted was not.

Per Curiam:

A person in carrying out even a lawful act on his own land, must ensure that his conduct or consequences of his act, would not cause physical damage to any neighbouring land, buildings or vegetation. If such damage happens, the seemingly lawful act would become unlawful to the affected neighbour, and he would be liable to such neighbour in nuisance.

[Judgment for the plaintiffs.]

Cases referred to:

Corporation of Greenock v. Caledonian Railway Company [1917] AC 556

a

JUDGMENT

Peh Swee Chin J:

b The plaintiffs, husband and wife respectively, owners of three lots and one lot respectively of rubber land concerned herein (but no co-proprietors), had claimed damages etc. for damage to rubber and fruit trees on their land as if they were such co-proprietors, and in the event of the award of damages, they were awarded without apportioning the same as between them, although damage of varying degree was caused to such trees on the different lots of the rubber land.

c The 2nd plaintiff said in evidence that the rubber land was managed by her husband the 1st plaintiff (PW2). 1st plaintiff said in evidence that he bought one of the four lots in 1973, the lot, (lot 4093) consisting of about 24 acres, which was tappable, which he continued tapping, but on which he planted 30 fruit trees at the same time and 27 of them later bore fruits. He bought the other three lots in July 1976. The three lots so bought were also tappable. I do not think the fact of a stream running through 2 of the lots, viz., lot 4093 and lot 4213 of the rubber land was disputed. 1st plaintiff dug a well in the stream on his land from which water was pumped to a mangling shed and smoke-house for curing the rubber. The defendant built a dam near the well, (apparently with the permission of the 1st plaintiff) with water from there being led by a pipe to the defendant's fish pond on defendant's land across a public road separating the plaintiffs' land and the defendant's land. The gist of 1st plaintiff's evidence was, further, that this dam and well were on the lot 4093 bought in 1973, and they were both constructed shortly after lot 4093 was bought. Ultimately no complaint of any kind arose from these dam and well on plaintiff's land. Then, in or about October 1976, he found flooding in parts of such rubber land. He investigated into this and found as he alleged that it was caused by another dam (hereinafter called the dam in question), which the defendant built on his own land across the public road. That dam in question, he alleged, had blocked up the flow of water from the same stream running from plaintiffs' land to the defendant's land. He took photographs, P3A and P3B, (same as the two photos in A14 i.e. p. 14 of the plaintiffs' bundle of documents marked "A"). P3A, he said, showed the land being flooded and P3B, the dam responsible for it and built by the defendant on his own land. He said that the water blocked by the dam as shown in P3B, went to the fish pond of the defendant and that the water was seen overflowing the top of this dam in P3B into the same stream again. He said that the pipe leading from the plaintiffs' land to the defendant's land did not affect the matter (i.e. did not cause the flooding). He complained to the defendant, asking him to release the water. Defendant did not respond, (i.e. did not do as requested) and he lodged a report with the police P4, (i.e. A15). Later he sent notices through solicitors, viz., P5, P5A, P5B, P6, P6A and P6B, (i.e. A17, A18, A19, A20, and A21 respectively). All these notices were returned unaccepted on the ground that the defendant's name was not correctly written. There was constant flooding between October 1976 and April 1977. The leaves withered, there was no tapping due to flooding, and all trees under the water died. He took four more photographs, P7A, P7B, P8A and P8B (i.e. A22 and A23). He lodged a further report to the police, viz. P9, (A24). During the dry period he took another photograph of the dam complained of, viz. P10 (A25). He said P10 showed an opening in the dam in question which used to be blocked up with some plank and which had since been removed when P10 was taken. He said the height of the dam was about 4 ft. He also took another photograph of the dying trees P11 (A26). He sent another notice through his lawyer P12 (A29). Again he sent another letter through his lawyer P13 (A32). About 600 trees died and there were 300 other trees which suffered from withered leaves and which were not tappable as they were under water. Up to the day he gave evidence i.e. 14 January 1983, a total of

700 trees had died. Eighteen (18) fruit trees had died, consisting of 8 durian trees, 6 mango trees, and 4 mata kuching trees. They were all planted in 1974. The action herein was filed in 1979 and since the filing of this action, the pipe from the plaintiffs' well to the defendant's fish pond had been dismantled.

a

In cross-examination, in substance, 1st plaintiff denied that the land (i.e., the part of the rubber land where the trees died) was not planted with rubber because the area was soggy. He did not sell the dead trees as firewood. In the middle of cross-examination, learned Counsel for plaintiffs informed the Court that his clients abandoned their claim for trespass as set out in para. 3 of the statement of claim relating not to the dam in question but to the construction of the dam and laying of pipe both on plaintiffs' land but his clients would claim damages concerning the dam in question. The 1st plaintiff denied that the dam and the well on plaintiffs' land had impeded the flow of the stream. He maintained he saw a piece of wood closing the gap of the dam in question on the defendant's land. He could see the piece of wood despite the overflowing water. He maintained that if the gap of the dam in question was blocked, there would be flooding, whether it was during rainy season or dry season. He said P11 was taken in 1978 during the dry season. He maintained that the dam in question was built by the defendant to block up water for the defendant's fish pond. He admitted he had never cleaned the stream since he bought his rubber land. The defendant removed the plank of the dam in question only after the summons was served on him. Before the removal of the said plank, during the dry season, his land was still flooded. The depth of flood water was between ½ ft. to 1 ft. There was water in P11 when it was taken but water could not be seen from P11.

b

c

d

PW3, Pengarah RISDA, Negeri Sembilan, gave evidence about the rubber trees on the rubber land in question being tappable or which ought to be tappable, according to his records.

e

PW4, a rubber planter of 32 years' experience, visited the plaintiffs' land in May 1982, and he tendered a report, P15, (i.e. A34). He saw some rubber trees had died or were dying over approximately 5 to 6 acres adjacent to the stream. This had resulted, in his opinion, in a loss of approximately 5 to 6 piculs of rubber per month and in terms of income, approximately RM300 per month to the plaintiffs on the basis of the lower figure of 5 piculs on an average price of RM2.50 per kilo. According to the report, the trees were planted in or about 1959, would have come into bearing in 1966 to 1967 and were expected to have a productive life of 30 years until 1995. Since the trees could not be tapped from 1977 onwards, the potential productive life was 19 years. The report also said 18 fruit trees had died. According to the report, all the rubber trees had died because of water stress due to periodic flooding and a raised water table caused in turn by a dam built across and stream in question about 100 ft. downstream from the boundary of plaintiffs' land i.e., in the defendant's land. In cross-examination, he said, normally, after heavy rain, land would be flooded temporarily but water would go down in a few hours. The affected land was flood-prone area. He did not think that the well on plaintiff's land would block up water because water in the stream would go around it. The well would be a very mild obstruction to the water in the stream. It would take two or three months for rubber trees, if continually under water, to die. He said he did not count the fruit trees, and the plaintiffs told him about the dead fruit trees. Referring to the dam in question, he said it blocked the stream, raised the water level and would cause silting of the stream itself. On his visit, there was nothing in the gap in the well, (i.e. the dam in question), and that water was flowing through the gap. He also saw a fish pond.

f

g

h

Defence began by calling a photographer, DW1, who took seven photographs on 26 January 1983 i.e. D16A to G, on the other side of the public road, i.e. plaintiffs' land. These photographs were taken to show the recent condition of the plaintiffs' land.

i

- a* DW2, a native to, or near that area of land in question said the land behind the bridge as shown in D16A was always subject to flooding whenever it rained, the land being the plaintiffs' land. There were rubber trees but in the seventies, all the trees died. In 1973 there were very few trees there. The trees also died even before 1973. In cross-examination, he said the trees in the foreground of P11 died in 1967. He did not agree that only in 1977, 1978 and 1979 flood water remained longer there. He did not see the dam in question.
- b* The next witness, DW3, said he had worked as a conductor in a rubber estate called Yong Yoke Chuan Estate identified by him as the land shown in D16A. The area shown in D16A was the plaintiffs' land. Most of the trees died in 1959, and he left the estate in 1970. More than 10 acres of the rubber land were affected, and these 10 acres were running along the stream. In heavy rain, water overflowed the bridge as shown in D16A. When he left in 1970 about one acre of the land behind the railings (as shown in D16A) of the bridge was without trees; and behind that one acre, there were parts of the land without trees also. In cross-examination, the trees in the one acre mentioned had died in 1968. The flooding was flash flooding. He said a field consisted of 600 trees or 3 acres. In re-examination, water would remain for a few days if there was continuous rain.
- c*
- d* The defendant said in his evidence, in substance, to the effect that he built the other dam on plaintiffs' land in 1975 to get water. Earlier than this other dam on the plaintiffs' land, he had built the dam in question on his own land. The dam in question was lower than its surrounding land and the public road. There was a drain also which he constructed "at" the dam in question i.e. near the dam in question. He built the dam in question to stop the mud flowing into the drain. The dam in question, which he called at one stage, a structure, did not hinder the flow of the water of the stream. The drain was seen in the left hand side bottom part of the photograph (ID5 - D17E). In 1975, there were already no rubber trees in the land of plaintiffs shown in D16A. In cross-examination, he denied he had built the dam in question in the middle of 1976. He admitted he built that dam on the plaintiff's land, (not the dam in question) to get water for his fish pond, but not for his pigsty. He admitted having a thousand pigs there. He admitted he needed a lot of water for them. He admitted having four fish ponds in fact, the largest of which was more than 300 ft. long. The fish ponds were about 4½ ft. deep. The purpose of the gap in the dam in question was to allow the stream water to pass through it. There was no reason to block up the gap with a plank. He agreed he needed a lot of water for his four fish ponds but denied having blocked the gap to make the water rise and flow into the fish pond. When shown the picture of the closed gap and of the water overflowing the top of the dam in question, he denied that the gap was blocked or that it took place in November or December, 1976. In re-examination, defendant said he stopped taking water in 1977 from the well or the dam on the plaintiffs' land. After this he took water from the river of which the stream in question was a tributary, by means of five pumps. When shown the picture of the dam in question i.e. P10, he maintained he built it in 1975.
- e*
- f*
- g*
- h* DW5, said he constructed the dam in question (which he called a wall) as shown in P10. This was constructed in 1975 to prevent earth from falling into a stream. This was constructed first before the other dam on the plaintiffs' land. In cross-examination he did not keep any records of the construction work. The object of this dam in question was to prevent earth from falling into the stream below. He could not build a wall on each side of the stream to prevent earth which came from both sides of the water (stream) to fall into the stream because such a wall would crack. He agreed that concerning the gap, if it was blocked up, it would block up the flow of water.
- i*

Learned Counsel for the defendant submitted that the areas on either side of the stream “at the down-stream end of the plaintiffs’ land” had poor drainage and could not be cultivated with rubber. In my view, it was not the case of the plaintiffs that only rubber trees on either side of the stream on plaintiffs’ land were affected. Thus in a photograph (P3A) taken by the 2nd plaintiff, it showed the pervasive and stagnant nature of a large flooded area in P3A.

a

It was submitted further that the well built by the plaintiffs in the stream on plaintiffs’ land had impeded the flow of the stream water and contributed to the flooding. Looking at a picture of it, i.e., P1A, the well appeared to be circular in shape. Its size or diameter was such that it could only partially block at the most the flow of the stream water. This partial blockage was rendered, in my view, quite harmless by two factors, i.e. as was said by PW4 who said he did not think that the well would hold up water which would go round the well and 1st plaintiff in cross-examination had said that he had made two holes to the well, presumably to its column, presumably to get the stream water into the well. Because of these two factors, in my view, the well was quite harmless and did not cause in any way material or substantial, to the flooding complained of, and not as contended by Counsel for defence.

b

Further learned Counsel for defence submitted that it was physically impossible for the dam in question i.e. as shown in P3B to cause flooding because the top part of the dam was below the level of the surrounding land or that of the public road nearby. The argument I found patently unacceptable, for the dam in question, whatever the motive for building it, was bound to dam up or pen up water, and this in turn would be likely to cause overflowing of the water of the stream or flooding, especially during the rainy season. The fact of the surrounding land being slightly higher than the top part of the dam in question could mean, of course, that flooding would take a longer time to form.

c

d

e

It was submitted further on the 1st plaintiff finding the gap in the dam left open when P10 was taken during dry season. He queried as to why it should be left open during the dry season when water should be in short supply. Looking at P10 closely, the dry season must have been so dry then that the stream’s sandy or muddy bed was even exposed to the camera. It would have been an exercise in futility then to close the gap.

f

It was submitted further that the plaintiffs did not construct any drains to drain away the water or weed the land property. I did not think that the plaintiffs should build drains by way of mitigating his losses, to drain away flood water brought about by someone’s wrongful act the cessation of which would bring an immediate end to the collection of the flood water that could kill rubber trees. To carry out weeding in flood water would be impracticable and useless. The defendant must appreciate that the plaintiffs did not claim loss resulting from lower yield from rubber trees due to flooding; but for trees that had been allegedly killed or destroyed.

g

It was next submitted that photographs, viz., P7A and P7B as showing the flooded land in January 1977 could not be relied on as showing a continuing flood because vegetation appeared to be green and fresh. Looking at them, it appeared at other places to be brown or blackish too. The vegetation appeared from P7A and P7B to be in varying stages of decay, not to mention the bald and brown-stained rubber trees. I could not agree that the water shown in the two photographs was brownish, consistent with flash flood. The reflections in the flood water as shown in these two photographs would appear to suggest that the flood water was stagnant and even clear enough for the reflections to be so clearly visible.

h

i

- a* I do not think it is necessary to refer to large number of split-hair criticisms levelled at the evidence of PW4, a rubber planter of 32 years' experience. Suggestions put to PW4 ought to have been substantiated by calling a witness of similar expertise.

- b* The defendant called DW1 to prove that the ground was wet when photographs (D16A to G) were taken in January 1983, presumably after the defendant had removed the plank which closed up the gap of the dam in question. The photographs do not show the flood water which was shown in P7A and P7B e.g., taken by the plaintiffs.

- DW2 was called to say that there were rubber trees in the area shown in D16A (next to the bridge) which had died in the seventies. The area of flooded water shown by the plaintiffs' photographs did not appear to be the same as the area shown in D16A, for, there was no sign of any bridge in the former and the former appeared to be a larger area than the latter.

- c* DW3 was called to say that by 1970 when he left the work on the estate bought over by the plaintiffs, most of the trees in the area shown in D16A had died. My observations just now equally apply. DW3 should have been taken by prior arrangement, to the areas as shown in all the photographs taken by the plaintiffs to show that both the area shown in D16A and that shown in photographs taken by the 1st plaintiff were one and the same area substantially.

- d* The defendant said in his evidence that he built the dam in question to prevent earth from falling into a drain. I was at a loss as to understand what he meant. Did he mean to say that there was a drain which he had dug which was just behind the dam on the downstream side of the dam? P3B did not show this drain there. There was on the other hand, every reason to believe that the stream water would flow through the open gap or overflow the top of the closed gap into continuing part of the self-same stream on the other side of the dam in question. If the dam in question was built to trap earth and I found this evidence suspect, there did not seem to have such earth in the surrounding area of the dam for it to trap, looking at the pictures of the dam in question. It could certainly be used for trapping earth, though it was too elaborate a structure for this purpose, but the dam would appear to be more likely for use for damming up water. The purpose of the dam, in any event, would not be strictly material, so long if the plaintiffs could establish that the dam caused the consequential flooding and damage as alleged. Similar evidence was given by DW5.

- f* There was really no difficult questions of law in this case. I can do no better than quote what Lord Justice - Clerk Hope said in *Kerr v. Earl of Orkney* 20 D 298 at 302:

- g* That principle is - that if a person chooses upon a stream to make a great operation for collecting and damming up the water for whatever purpose, he is bound . . . to protect all persons. . . from all danger . . . It is no defence in such a case to allege the dam would have stood against all ordinary rains - it gave way in an extraordinary and unprecedented fall of rain ... The dam must be made perfect against all extraordinary falls of rain ...

This passage was cited with approval in *Corporation of Greenock v. Caledonian Railway Company* [1917] AC 556.

- h* A person in carrying out even a lawful act on his own land, must ensure that his conduct or consequences of his act, would not cause physical damage to any neighbouring land, buildings or vegetation. If such damage happens, the seemingly lawful act would become unlawful to the affected neighbour, and he would be liable to such neighbour in nuisance.

It will be seen that from what I have set out or mentioned above, this case was almost all on facts which I found as follows:

- i* (1) The defendant needed a great deal of water for his four fish ponds created by excavation, not being natural ponds or disused mining pools;

- (2) the defendant built the dam in question on his land to dam up water for the use of fish ponds, some time in 1976; **a**
- (3) the dam had caused overflowing of the stream water in the upper part of the stream where it ran through the plaintiffs' land;
- (4) the overflowing of the stream combined with rain or heavy rain, caused the flooding as shown in the photographs taken by the plaintiffs. The flooding caused was not a flash flood due to heavy rain when such rain water would have subsided after a few hours or a day or two. Without the dam in question damming up the stream water, the continuous flooding that occurred on the plaintiffs' land would not have taken place; **b**
- (5) the continuous flooding so caused, caused the consequential damage complained of; and **c**
- (6) having seen the 1st plaintiff give evidence, I was not only impressed by him as a witness of truth, his evidence was found entirely to be consistent with the photographs he took of the dam in question and the flooding. I accepted his evidence as against the evidence of defendant who did not impress me as a witness of truth or a person who would entertain a great deal of respect for truth. Thus, when shown P3B, the picture of the dam in question with the gap in it closed up and the stream water overflowing the top of such gap, the defendant still found it possible to deny that the gap was closed. **d**

On the question of cause and effect of the flooding on the plaintiffs' land, they had been established on a balance of probabilities, to my entire satisfaction, in other words, liability in this case had been proved.

On the question of quantum, I was unable to accept the submission that damages in the form of loss of income from the destroyed rubber trees ought to be based on the remaining tapping life of the rubber trees, had they not died like those fatal accident claims. When the rubber trees died in 1979, the plaintiffs would have to mitigate their losses by replanting, for though the trees had been destroyed, the land on which they were planted was not. According to the evidence of PW 4 which I accepted, as against the evidence of defence witnesses on similar points, he assessed the loss at RM300 per mensem based on loss of 5 piculs of rubber in turn, based on 5 acres of rubber land. Since the information of the area or number of acres affected, must have come from the 1st plaintiff to the PW4; taking account of potential margin of error or exaggeration, I would take 4 acres as the area affected, and the proportional loss of earnings would be reduced to RM240 per mensem. Since the plaintiffs said that the plank of the gap was only removed and the flooding ceased after service of summons, the loss would be RM240 per mensem from 1 October 1976 (to round off the figure) to date of filing, for about 35 months, totalling RM8,400. After the date of filing i.e. after the flooding ceased, I allowed ½ year for completing the said replanting, 7 years for the new rubber trees to mature and to be tappable, the probable loss would be RM240 per mensem for 7½ years totalling RM21,600. The figure must be reduced by 1/5 for contingencies such as destruction by fire, the change of ownership of rubber land etc. When so reduced, the figure would be RM17,280. Cost of replanting would in the absence of evidence have to be assessed somehow, at a comparatively low figure of RM1,000 per acre or RM4,000 for 4 acres. I awarded the damages for the loss of the fruit trees as claimed, i.e. RM900. The grand total was therefore RM30,580.00 for which I gave judgment and costs. **e**

Also found at [1984] 2 CLJ 177

f

g

h

i